NO. 391

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

ROBERT BALLARD BAILEY, *Petitioner*

v.

THE STATE OF WEST VIRGINIA, *Respondent*

BRIEF OF RESPONDENT IN OPPOSITION TO ALLOWANCE OF WRIT OF CERTIORARI

JURISDICTION

According to the statement in the petition for a writ of certiorari, the jurisdiction of this Court is invoked under the provisions of Section 1257(3), United States Code, and Section 5(a) of Rule 38 of the Revised Rules of this Court. (Petition, page 2.)

From the petition, we infer that petitioner would have this Court grant a writ of certiorari in this case on one or both of the following contentions, namely:

> (1) The refusal of the Supreme Court of Appeals of West Virginia to follow *Shepard* v. *United States,* 290 U. S. 96, 78 L. Ed. 196; *Carver* v. *United States,* 160 U. S. 553, 40 L. Ed. 532; and *Mattox* v.

United States, 146 U. S. 140, 36 L. Ed. 917 (Petition, pages 10, 11); and

(2) The Supreme Court of Appeals of West Virginia has violated the Sixth and Fourteenth Amendments of the Constitution ot the United States by refusing to follow the above cases, and refusing to hold that the dying declarations of Rosina Fazio, the victim, were inadmissible on the trial of petitioner. (Petition, pages 11, 12).

We do not believe that any vestige of a federal question can be gleaned from either the petition or the brief in support thereof filed by petitioner other than these two.

In answer to the contentions of petitioner, the State of West Virginia contends:

(1) There was no question raised in any court below that the petitioner had been deprived of any right under the Constitution of the United States, and therefore any such right involved herein has been waived; and

(2) There is no substance to the claim of petitioner that he has been deprived of a right granted or preserved to him by the Constitution of the United States under either the Sixth or Fourteenth Amendments.

STATEMENT OF CASE

Robert Ballard Bailey was convicted in the Intermediate Court of Kanawha County, West Virginia, for the murder of Rosina Fazio, who died on the 24th day of October, 1949, and was sentenced to be electrocuted. (R. 13). On the 13th day of May, 1950, the Circuit Court of Kanawha County, an intermediate appellate court, refused Bailey a writ of error and supersedeas to the judgment of the Intermediate Court (R. 161), and on the 7th day of June, the 13th day of June, the 3rd day of July, the 7th day of August, and the 8th day of August,

all in the year 1950 (R. 162, 164, 182), the Supreme Court of Appeals of West Virginia, the highest court in the State of West Virginia, denied a writ of error and supersedeas to the judgment of the Circuit Court.

On the trial of petitioner, certain dying declarations of Rosina Fazio were admitted in evidence over the objection of petitioner.

The first witness to testify about such dying declarations was Joe Fazio, age twenty-seven, son of Rosina Fazio, who testified that he first visited his mother in the St. Francis Hospital, in the City of Charleston, West Virginia, where she lay on her death bed, between the hours of six and seven o'clock on Sunday morning, the 23rd day of October, 1949. (R. 78). Mrs. Fazio was hospitalized for pain in the neck and back following an injury that paralyzed all the local extremities and a partial paralysis of the arm, a loss of all sensation from the upper part of the chest down and a total lack of sensation with a complete paralysis of the lower extremities of the chest wall muscles, all caused by a spinal cord injury. (R. 27). But Mrs. Fazio was mentally alert on Sunday, October 23, when she made these dying declarations. (R. 28). Mrs. Fazio had been found on a vacant lot in the City of Charleston, at twenty-five minutes after eleven o'clock on October 22, suffering from the injuries which caused her death. (R. 49). Joe talked to his mother concerning her injuries and with reference to her expectancy of life. She told Joe that she was going to die (R. 79), and in the same conversation complained of "this thing" (a halter on her neck with attached weights), (R. 27), said she had been suffering a whole lot, and wanted all the kids to be there, that she was going to die. (R. 79). After this conversation, Joe, with his brother, Jim Fazio, went to police headquarters and developed a picture of the defendant, Robert Ballard Bailey. (R. 80). This action was taken because Rosina Fazio had told Joe, in her conversation

during which she said she was going to die, that Bob, the glass cutter had given her a lift (R. 80), that Bob had broken all her bones (R. 79), and had robbed her. (R. 81). After this picture was developed Joe took the print back to his mother in the hospital, and she there identified the picture as being the picture of Robert Bailey, whom she at that time said had robbed her. (R. 81). On cross-examination, Joe said that his mother told him it was "Bob, the glass cutter," that she didn't know his name, and when he mentioned the word Bailey she remembered it. (R. 84).

Frank Fazio, another son of Rosina Fazio, saw his mother between two and four o'clock on Sunday afternoon, October 23, and talked to her concerning her physical condition and her expectancy of life. She told Frank that she was not going to live, that all her bones were broken and she couldn't feel anything, and she was not going to live long. (R. 97). At that time she was in distress and hurting. After she had made these statements, she told Frank, in reply to his answer as to who had done it, "Frank, you know; Bob, the glass cutter." (R. 97). Mrs. Frank Fazio, daughter-in-law of Rosina Fazio who was present at the time of the conversation between Frank and his mother, said that Rosina Fazio had said she was going to die, "He killed me, he broke all my bones and I know I will die." (R. 99). The person designated by Rosina Fazio as having committed this crime was "Bob, the glass cutter." She further testified that Rosina Fazio said, "He dragged her by the hair and put her back in the car once." (R. 99). Rosina Fazio died at six o'clock on the morning of October 25. (R. 28, 29.)

ARGUMENT SUMMARY

I

A writ of certiorari should not be granted by this Court to a judgment of a State Court when no substantial federal question is involved.

Yakus v. *United States,* 321 U. S. 414, 88 L. Ed. 834;

Whitney v. *California,* 274 U. S. 357, 71 L. Ed. 1095.

II

The Sixth Amendment of the Constitution of the United States does not govern procedure in the trial of criminal cases in State Courts.

Wolf v. *Colorado,* 338 U. S. 25, 93 L. Ed. 1782;

Adamson v. *California,* 332 U. S. 46, 91 L. Ed. 1903;

Betts v. *Brady,* 316 U. S. 455, 86 L. Ed. 1595;

West v. *Louisiana,* 194 U. S. 258, 48 L. Ed. 965.

III

The Fourteenth Amendment to the Constitution of the United States does not guarantee a trial of State crimes in State Courts free from error, and does not require a State to conform to federal procedure and federal rules of evidence.

Bute v. *Illinois,* 333 U. S. 640, 92 L. Ed. 986;

Buchalter v. *New York,* 319 U. S. 427, 87 L. Ed. 1492;

Lisenba v. *California,* 314 U. S. 219, 86 L. Ed. 166;

Snyder v. *Massachusetts*, 291 U. S. 97, 78 L. Ed. 674;

West v. *Louisiana*, 194 U. S. 258, 48 L. Ed. 965;

Patterson v. *Colorado*, 205 U. S. 454, 51 L. Ed. 879.

IV

The Fourteenth Amendment to the Constitution of the United States is not concerned with the conduct of a criminal trial in a State Court if such trial were conducted with fundamental fairness, did not work a denial of fundamental rights or conflict with specific and applicable provisions of the Constitution of the United States, and was conducted according to the accepted course of legal proceedings. The burden of showing essential unfairness is upon him who asserts it.

Wolf v. *Colorado*, 338 U. S. 25, 93 L. Ed. 1782;

Buchalter v. *New York*, 319 U. S. 427, 87 L. Ed. 1492;

Lisenba v. *California*, 314 U. S. 219, 86 L. Ed. 166;

Jordan v. *Massachusetts*, 225 U. S. 167, 56 L. Ed. 1038.

ARGUMENT

I

An insurmountable obstacle to the granting of a writ of certiorari by this Court is that there was no contention before any court of the State of West Virginia that rights granted to the defendant by the Constitution of the United States had been violated. The printed record of this case filed in this Court does not disclose that the petitioner, at any time, in any manner, contended that any

action of any court through which this case has passed, deprived him of any of his rights under the Constitution of the United States.

It is settled law that in reviewing a judgment of a state court, this Court is bound by the record on which that judgment is based. *Hedgebeth* v. *North Carolina*, 334 U. S. 806, 92 L. Ed. 1739. And the determination of the state court that the practice and procedure by which such judgment was obtained conforms to the law of that particular state is conclusive on this Court. *Jordan* v. *Massachusetts*, 225 U. S. 167, 56 L. Ed. 1038; *West* v. *Louisiana*, 194 U. S. 258, 48 L. Ed. 965. This Court in the latter case said (page 261 of official report):

> "Whether the state court erred in its construction of the state Constitution and statutes and the common law on the subject of reading depositions of witnesses is not a Federal question. We are bound by the construction which the state court gives to its own Constitution and statutes and to the law which may obtain in the state, under circumstances such as those existing herein."

The failure of petitioner to claim at an appropriate time that his constitutional rights were violated by the actions of the state court precludes complaint to this Court that his rights under the Constitution of the United States have been invaded. In *Yakus* v. *United States*, 321 U. S. 414, 444, 445, 88 L. Ed. 834, 859, 860, the Court says:

> "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. O'Neil v. Vermont, 144 U. S. 323, 331, 12 S. Ct. 693, 36 L. Ed. 450; Barbour v. State of Georgia, 249 U. S. 454, 460, 39 S. Ct. 316, 317, 63 L. Ed. 704;

> Whitney v. People of State of California, 274 U. S. 357, 360, 362, 380, 47 S. Ct. 641, 71 L. Ed. 1095. Courts may for that reason refuse to consider a constitutional objection even though a like objection had previously been sustained in a case in which it was properly taken. Seaboard Air Line R. Co. v. Watson, 287 U. S. 86, 53 S. Ct. 32, 77 L. Ed. 180, 86 A. L. R. 174. *While this Court in its discretion sometimes departs from this rule in cases from lower federal courts, it invariably adheres to it in cases from state courts,* see Brandeis J. concurring in *Whitney* v. *California, supra* (274 U. S. at page 380, 47 S. Ct. 641, 71 L. Ed. 1107), and it could hardly be maintained that it is beyond legislative power to make the rule inflexible in all cases." (Italics supplied).

The mere fact a federal question may be hidden in the record does not permit this Court to consider this question for the first time. In *Whitney* v. *People of State of California,* 274 U. S. 357, 362, 71 L. Ed. 1095, 1100, says:

> "It is not enough that there may be somewhere hidden in the record a question which, if it had been raised, would have been of a Federal nature. *Dewey* v. *Des Moines,* 173 U. S. 199, 43 L. Ed. 666, 19 Sup. Ct. Rep. 379; *Keokuk & Hamilton Bridge Co.* v. *Illinois,* 175 U. S. 634, 44 L. Ed. 302, 20 Sup. Ct. Rep. 205. And this necessarily excludes from our consideration a question sought to be raised for the first time by the assignments of error here, —not presented in or passed upon by the Court of Appeal, — whether, apart from the constitutionality of the Syndicalism Act, the judgment of the Superior Court, by reason of the rulings of that court on questions of pleading, evidence and the like, operated as a denial to the defendant of due process of law."

Petitioner relies upon the order of the Supreme Court of Appeals of West Virginia entered on August 8, 1950,

refusing a writ of error and supersedeas and staying execution of sentence (R. 183) as indicating that the State court passed upon the federal question of whether petitioner had been denied due process of law. The order, however, does not so state. To the contrary, a writ of error and supersedeas to the judgment of the Circuit Court was refused at the request of petitioner (R. 181), upon the fifth application for the reason that the judgments of the Intermediate Court and the Circuit Court were plainly right. A further motion for a ninety day stay of execution was granted by a majority of the court by the same order, as authorized by West Virginia Code, 58-5-31. This statute is set out as Appendix A hereof. The fact that two judges would have refused the motion for a stay, for the reason that they were of opinion that no federal question arises in the case, does not indicate that the majority, in granting a stay as authorized by West Virginia Code, 58-5-31, considered the particular federal question of due process of law, especially since it had not been presented to the court either by petition or brief by petitioner, and the order of the court (R. 183) discloses the majority of the court specifically granted the stay pursuant to a state statute, Code 58-5-31, permitting a stay of execution for ninety days at the instance of any party to a controversy in the Supreme Court of Appeals who desired to present a petition to the Supreme Court of United States for an appeal from, or writ of error or supersedeas to, a final decree, judgment or order of the Supreme Court of Appeals. There is nothing in the statute cited requiring a finding by the Supreme Court of Appeals that a federal question, substantial or otherwise, exists in a case before a stay of execution could be granted thereunder. It is significant that the three judges who granted the stay refrained from stating that they believed a federal question did arise in the case. It seems logical to assume that such a statement would have been made particular-

ly by the two judges who would have granted a writ of error and supersedeas, if they had been of the opinion that such question did arise on the record. We respectfully submit that this Court is bound by the record and brief submitted to the Supreme Court of Appeals of West Virginia on the five futile applications for a writ of error and supersedeas, and that nothing in the order entered on the fifth application authorizes an inference that the Supreme Court of Appeals was acting on a basis that had never been presented to it. As this Court well knows, there are many petitions presented to it that involve no semblance of a federal question.

II

We respectfully submit that there is no federal question presented or involved in an interpretation by the state courts as to what constitutes, in a particular case, a proper dying declaration which may be used as evidence in a state criminal trial.

The petitioner is wrong in assuming that the Sixth Amendment of the Constitution of the United States governs procedure in the trial of criminal cases in state courts. The cases cited by petitioner, namely, *Shepard* v. *United States, supra, Carver* v. *United States, supra,* and *Mattox* v. *United States, supra,* are not in point. These decisions all refer to admission in evidence in a federal court criminal trial of certain dying declarations. It is well settled that the so-called Bill of Rights, as expressed in the first eight amendments to the Constitution of the United States does not govern procedure in the trial of criminal cases in state courts. *Betts* v. *Brady,* 316 U. S. 455, 86 L. Ed. 1595; *West* v. *Louisiana,* 194 U. S. 258, 48 L. Ed. 965. In the case of *Adamson* v. *California,* 332 U. S. 46, 51, 91 L. Ed. 1903, 1908, this Court held that the Bill of Rights, when adopted, was for the protection of the individual against the federal govern-

ment and its provisions were inapplicable to similar actions done by the states. In the case of *Wolf* v. *Colorado*, 338 U. S. 25, 26, 93 L. Ed. 1782, 1785, this Court stated that the notion that the due process of law is short hand for the first eight amendments of the Constitution of the United States has been rejected by this Court time and again and the issue is closed.

III

The Fourteenth Amendment to the Constitution of the United States does not guarantee a trial of state crimes in state courts free from error even material error. It was held in the case of *Snyder* v. *Massachusetts*, 291 U. S. 97, 105, 78 L. Ed. 674, 677, that the procedure of a state does not violate the Fourteenth Amendment because another method may seem fairer or wiser or give a surer promise of protection to a prisoner. An excellent statement of respondent's position is found in *Buchalter* v. *New York*, 319 U. S. 427, 429, 87 L. Ed. 1492, 1495, holding that the Fourteenth Amendment does not draw to itself the provisions of state constitutions or state laws. It leaves the states free to enforce their criminal laws under such statutory provisions and common law doctrine as they deem appropriate; and does not permit a party to bring to the test of a decision in this Court every ruling made in the case of a trial in a state court. It was held in *West* v. *Louisiana*, 194 U. S. 258, 48 L. Ed. 965, that errors of the state court in construing a state constitution, statutes, and the common law on the subject of reading depositions of witnesses does not present any federal question which can be reviewed by the Supreme Court of the United States. In the case of *Bute* v. *Illinois*, 333 U. S. 640, 92 L. Ed. 986, this Court at pages 656, 657 of the official report states:

> "* * * There is nothing in the Fourteenth Amendment specifically stating that the long

> recognized and then existing power of the states over the procedure of their own courts in criminal cases was to be prohibited or even limited. * * *"

The court, at page 659, further states:

> "It is natural for state procedures to differ from each other in many ways. It is permissible for the states to establish ways of safeguarding the respective interests of the prosecution and of the accused in their courts. * * *"

It is stated on page 668 of the same opinion:

> "If, in the face of these widely varying state procedures, this Court were to select the rule contended for by the petitioner and hold invalid all procedure not reaching that standard, it not only would disregard the basic and historic power of the states to prescribe their own local court procedures (subject only to a broad constitutional prohibition in the Fourteenth Amendment against the abuse of that power) but it would introduce extraordinary confusion and uncertainty into local criminal procedure where clarity and certainty are the primary essentials of law and order."

In the case of *Patterson* v. *Colorado*, 205 U. S. 454, 51 L. Ed. 879, it was held that a decision of a state court upon a question of law cannot be reviewed by this Court as presenting a question of the violation of the Fourteenth Amendment because such decision is asserted to be wrong, and contrary to the previous decisions of the same court.

Petitioner also complains of certain instructions given and refused by the trial court in this case in the trial of the case below. Respondent again contends that giving or refusing to give instructions is a matter of state procedure and does not involve a federal question. *Buchalter* v. *New York*, 319 U. S. 427, 87 L. Ed. 1492. The

trial court acted properly, pursuant to state procedure, in refusing these specific defense instructions. See *State* v. *Stephenson*, 114 W. Va. 458, 172 S. E. 533, Syl. 1.

IV

This Court has said:

> "The Fourteenth Amendment, however, does not say that no state shall deprive any person of liberty without following the *federal* process of law as prescribed for the federal courts in comparable federal cases." *Bute* v. *Illinois*, 333 U. S. 640, 649, 92 L. Ed. 986, 991.

The Fourteenth Amendment does not prevent a state from determining its own rules of relevance of evidence to be used in the trial of a homicide case. *Lisenba* v. *California*, 314 U. S. 219, 86 L. Ed. 166. In the *Lisenba* case this Court held that the Fourteenth Amendment does not forbid a state court to construe and apply its own laws declaring the uncorroborated testimony of an accomplice to be insufficient to sustain a conviction by holding such testimony to have been sufficiently corroborated. This Court said in the same case (page 236 of the official report),

> "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false. * * *"

In the case of *Wolf* v. *Colorado*, *supra*, this Court considered a prosecution in a state court for a state crime and held that the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure.

The *Shepard*, *Carver* and *Mattox* cases, *supra*, relied on by petitioner, do not establish that there is any constitutional provision involved in the use of dying dec-

larations, and the decision in all of these cases involved a trial in a United States district court under federal rules of evidence.

In the instant case the victim knew she was going to die, held no hope of recovery, made statements identifying her assailant, stated that her assailant had robbed her, and died approximately forty-eight hours after the first of such statements. Certainly, it cannot be said that the courts of West Virginia have violated the Fourteenth Amendment by holding that the circumstances under which such declarations were made had such sanctions of verity as to give them evidentiary value which a jury could accept or reject gave reasonable assurance that they were true. We find neither logic nor authority in the petition or brief in support thereof which would show such conduct of the West Virginia State courts to be arbitrary and without foundation in reason.

CONCLUSION

We respectfully pray that petitioner be denied a writ of certiorari in this case.

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APPENDIX "A"

CODE OF WEST VIRGINIA

Section 31, Article 5, Chapter 58 of the Code, as amended, reads:

> "At the instance of any party to a controversy in the supreme court of appeals who desires to present a petition to the supreme court of the United States for an appeal from, or writ of error or supersedeas to, a final decree, judgment or order therein, the supreme court of appeals during the term at which it is rendered or made, or any judge thereof within sixty days after the end of the term at which such decree, judgment or order is rendered or made, may make an order (which, if made in vacation, shall be certified by the judge to the clerk of said last mentioned court, and be entered by him in the proper order book) suspending the execution of such decree, judgment or order for ninety days after the end of the term at which it is rendered or made, when such person shall give bond before the clerk of said last mentioned court, or the clerk of the circuit court, from which the case or cause was taken to the supreme court of appeals, in such penalty as the court or judge may require, with a condition reciting such decree, judgment or order, and the intention of such person to present such petition, and providing for the payment of all such damages as any person may sustain by reason of such suspension, in case a supersedeas to such decree, judgment or order should not be allowed and be effectual within the time so specified."